# TN Metal Industries Sdn Bhd & Ors v Ng Pyak Yeow

HIGH COURT (KUALA LUMPUR) — COMPANIES (WINDING-UP) NO D5-28-400-93
KAMALANATHAN RATNAM JC
16 NOVEMBER 1995

***Companies and Corporations*** *— Winding up — Liquidators — Provisional liquidator — Whether malicious prosecution, abuse of process and trespass was committed by provisional liquidator — Whether leave of court necessary before case brought against provisional liquidator — Whether provisional liquidator was in office and was an officer of the court*

***Civil Procedure*** *— Action — Commencement — Application for leave to bring action at common law against provisional liquidator — Application made under same case number and action as winding-up action — Whether applicants bound to confine themselves to intitulement — Whether application should be by originating summons*

The petitioners filed a petition to wind up the respondent company under ss 218 and/or 143 of the Companies Act 1965 ('the Act'). Prior to the winding-up order being made, a provisional liquidator ('the provisional liquidator') of the respondent company was appointed by an order of the High Court on 6 April 1995. The provisional liquidator obtained an order for the bailiff to take possession and control of Lot 1, Lorong 10B, Telok Panglima Garang, Banting, 42500 Kuala Langat ('the Telok Panglima address') and to deliver possession of the said property to the provisional liquidator. In support of the application, the provisional liquidator affirmed that he had been informed by a representative of the respondent company that its documents, books and other effects of business were to be found at the Telok Panglima address. He then proceeded to the Telok Panglima address and met a director of the respondent company, who refused to vacate the premises and hand him the keys to the property even after being shown the sealed copy of the order of the court appointing him the provisional liquidator. Therefore, he made a police report against that director and obtained an ex parte order for a warrant of arrest from the High Court which was later successfully set aside by the respondent company. Having set aside the order, the four applicants filed this application for leave to commence proceedings in tort against the provisional liquidator and to claim special damages. The applicants alleged that (a) the proposed defendants unlawfully conspired to injure them by abuse of legal process, malicious enforcement of order and trespass; (b) there were certain crucial facts missing from the police report; (c) the provisional liquidator took directions from the petitioners; and (d) the proposed defendants wanted to paralyse the four applicants' business to apply pressure on the directors of the respondent company to settle the unjust demands of the petitioners. The applicants' claim was supported by an affidavit affirmed by Tay Yew Keng, the managing director of the first applicant. The provisional liquidator averred that the applicants and the respondent company were all related companies

and shared some directors and shareholders. He also questioned the propriety of the affidavit of Tay who affirmed the affidavit on behalf of all the other three individual legal entities. The provisional liquidator argued that (a) if the applicants had any bona fide complaints against him they should first take their complaint to the Official Receiver as provided for under s 229(1) of the Act; and (b) by virtue of r 63 of the Companies (Winding-Up) Rules 1972 ('the Rules') and s 14 of the Courts of Judicature Act 1964, he was an officer of the court and was therefore conferred judicial protection in the lawful discharge of his duties.

**Held,** dismissing the application:

(1) The fact that the three independent legal entities have entrusted their case into the hands of the managing director of the first applicant lent weight to the suggestion that the applicants and the respondent company shared the same directors and shareholders and that their relationships were closely intertwined and interrelated. There was no specific denial of the interrelationship between the applicants and the respondent company as alleged by the provisional liquidator. Therefore, the principle that where one party made a positive assertion upon a material issue, the failure of his opponent to contradict it was usually treated as an admission by him of the fact so asserted applied (see p 578D–G; *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 followed).

(2) There was no requirement that the maker of a police report had to state every allegation in his police report. Once a report stating basic facts necessary to commence an investigation was made then a statement was recorded and details would be given in that statement. Also, the provisional liquidator had to take directions from the petitioners and he had to be accompanied by the petitioners' solicitors. This did not amount to collusion or conspiracy. As opposed to such bare allegations, was the untarnished record of the provisional liquidator whose credentials and work had been laid bare and no impropriety or abuse of power or process had been shown in respect of any of the 160 companies he had so far wound up by order of the High Court of Malaya (see pp 578I, 579A–B; *Chock Kek Ling v Patt Hup Transport Co Ltd & Ors* [1966] 1 MLJ 120 followed).

(3) On the facts as they stood on the affidavits, there was no substance in the applicants' allegations. Taking into consideration the facts of the present case, as averred by the applicants in the various affidavits, the attitudes, beliefs and objectives of the petitioners and the provisional liquidator were nothing more than to execute the due process of the law. In any event, the absence of reasonable and probable cause was not shown by the applicants. Therefore, the applicants had failed to show a case for malicious prosecution, because throughout the alleged trespass and/or act of malicious prosecution, the provisional liquidator had proceeded on the

guidance and advice of solicitors including the petitioners' solicitors (see pp 580F, H, 581C; *QIW Retailers Ltd v Felview Pty Ltd & Anor* (1989) 7 ACLC 510 followed).

(4) Where a legal process had been perverted to satisfy some other motive such as extortion or oppression, an action would lie at the feet of a party that suffered the wrong. This was the tort of abuse of process which depended on the misuse of the process however correctly it was obtained. The abuse of process must be used mainly for a purpose outside the scope of the legal process or an action which the court was asked to adjudicate upon. In the present case, the applicants had not satisfied the court that the facts supported a case for abuse of process against the provisional liquidator. This was because there would be no abuse involved if a plaintiff genuinely sought to achieve what he was entitled to by way of a suit and thus filed the suit for the purpose of achieving that objective (see p 583B–F, H; *Grainger v Hill* (1838) 4 Bing NC 212; 132 ER 769 and *Goldsmith v Sperrings Ltd* [1977] 2 All ER 566 followed).

(5) The applicants herein were third parties affected by the conduct of the provisional liquidator and they did not fall within the ambit of s 229(1) of the Act or r 277(2) of the Rules (see p 584E).

(6) To bring a case against officers of the court, leave of court should be obtained. As this was a case where the applicants intended to file proceedings in tort against a court appointed provisional liquidator, leave must be sought. This was because the mischief complained of by the applicants was done whilst the provisional liquidator was in office which meant that he was an officer of the court (see p 585I; *Zainal Abidin Putih & Anor v Che Wan Development Sdn Bhd* [1992] 2 MLJ 233 and *Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204 followed).

(7) Clearly, the present application was based on ss 218 and 143 of the Act. As the applicants had taken out a summons in chambers under the same case number dealing with the companies winding-up action and specifically raised in the intitulement that they would rely on the provisions of the sections of the Act which the applicants felt were relevant to their purpose, they were bound by their own course of action. Fair warning had been given to the provisional liquidator that the applicants would confine themselves to the Act and, therefore, they must find their remedies within the strict walls of the Act. This meant that it was wrong for the applicants to seek leave under the suit already filed which related to company matters. The claim in tort was under common law and the applicants should have applied by way of originating summons instead. Further, the application for leave to issue a writ under common law for damages ought to have been by way of originating summons too. Therefore, the application must fail (see pp 586E, 587D, I, 588A; *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457 followed).

(8) A stong prima facie case on the facts must be established before leave would be given to sue a liqudator. However, on the facts and the law relating to this case, the applicants had failed to show that there was sufficient evidence to warrant the granting of leave to file an action for the tort of conspiracy, abuse of legal process, malicious prosecution and trespass (see p 588G, H; *Furber v Kratter* (The Times, 21 July 1988) not followed).

**[Bahasa Malaysia summary**

Pempetisyen telah memfailkan petisyen untuk menggulung syarikat penentang di bawah ss 218 dan/atau 143 Akta Syarikat 1965 ('Akta itu'). Sebelum perintah penggulungan dibuat, seorang penyelesai sementara syarikat penentang ('penyelesai sementara itu') telah dilantik oleh perintah Mahkamah Tinggi bertarikh 6 April 1995. Penyelesai sementara itu telah memperolehi satu perintah untuk bailif mengambil milikan dan kawalan Lot 1, Lorong 10B, Telok Panglima Garang, Banting, 42500 Kuala Langat ('alamat Telok Panglima itu') dan untuk menyampaikan milikan harta itu kepada penyelesai sementara itu. Untuk menyokong permohonannya, penyelesai sementara itu telah mengikrarkan bahawa beliau telah diberitahu oleh seorang wakil syarikat penentang bahawa dokumen, buku dan lain-lain barang kepunyaan syarikat penentang boleh didapati di alamat Telok Panglima itu. Dia kemudiannya pergi ke alamat Telok Panglima itu dan berjumpa dengan seorang pengarah syarikat penentang yang enggan mengosongkan premis dan menyerahkan kunci hartanah itu kepadanya walaupun setelah ditunjukkan salinan perintah mahkamah yang dimeterikan yang melantiknya sebagai penyelesai sementara. Maka, dia telah membuat laporan polis terhadap pengarah itu dan mendapatkan suatu perintah waran tangkap ex parte daripada Mahkamah Tinggi yang kemudiannya diketepikan dengan jayanya oleh syarikat penentang. Setelah mengetepikan perintah itu, empat pemohon itu telah memohon kebenaran untuk memulakan tindakan tort terhadap penyelesai sementara itu dan untuk menuntut ganti rugi khas. Pemohon mengatakan bahawa (a) defendan yang dicadangkan itu telah berkomplot secara tidak sahnya untuk membawa kerugian kepada mereka melalui penyalahgunaan proses undang-undang, penguatkuasaan perintah dengan niat jahat dan pencerobohan; (b) terdapat perkara penting yang tidak disertakan dalah laporan polis; (c) penyelesai sementara telah mengambil arahan daripada pempetisyen; dan (d) defendan yang dicadangkan itu mahu mematahkan perniagaan keempat-empat pemohon untuk memaksa pengarah-pengarah syarikat penentang menyelesaikan tuntutan pempetisyen yang tidak berasas. Tuntutan pemohon disokong oleh afidavit yang disahkan oleh Tay Yew Keng, pengarah urusan pemohon pertama. Penyelesai sementara telah mengesahkan bahawa pemohon dan syarikat penentang adalah syarikat yang mempunyai perkaitan perhubungan dan berkongsi beberapa pengarah dan pemegang syer. Dia juga menyoal kesusilaan afidavit Tay Yew Keng yang telah mengikrarkan afidavit bagi pihak ketiga-tiga entiti sah yang berasingan.

Penyelesai sementara berhujah bahawa (a) jika pemohon mempunyai apa-apa aduan bona fide terhadapnya mereka patut terlebih dahulu membuat aduan kepada Pegawai Penerima seperti yang diperuntukkan di bawah s 229(1) Akta itu; dan (b) mengikut k 63 Kaedah-Kaedah (Penggulungan) Syarikat 1972 ('Kaedah-Kaedah itu') dan s 14 Akta Mahkamah Kehakiman 1964, beliau adalah seorang pegawai mahkamah dan oleh itu diberikan perlindungan kehakiman dalam menjalankan tugasnya secara sah.

**Diputuskan**, menolak permohonan itu:

(1) Hakikat bahawa ketiga-tiga entiti sah yang berasingan telah mengamanahkan kes mereka kepada tangan pengarah urusan pemohon pertama telah menguatkan cadangan bahawa pemohon dan syarikat penentang berkongsi pengarah dan pemegang syer yang sama dan bahawa hubungan mereka amat berkait rapat. Tiada sebarang penafian spesifik mengenai perkaitan hubungan di antara pemohon dan syarikat penentang seperti yang diperkatakan oleh penyelesai sementara itu. Maka, prinsip bahawa apabila satu pihak membuat satu penegasan positif di atas suatu isu yang penting, kegagalan pihak lawannya untuk menafikannya akan biasanya dianggap sebagai suatu pengakuan olehnya mengenai fakta yang dinyatakan terpakai (lihat ms 578D–G; *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 diikut).

(2) Tiada keperluan bahawa seseorang yang membuat laporan polis mesti menyatakan setiap pengataan di dalam laporan polisnya. Sebaik sahaja sesuatu laporan yang menyatakan fakta-fakta asas yang perlu untuk memulakan penyiasatan dibuat, maka suatu pernyataan akan direkodkan dan butir-butir akan diberikan di dalam pernyataan itu. Juga, penyelesai sementara terpaksa mengambil arahan daripada pempetisyen dan dia terpaksa ditemani oleh peguamcara pempetisyen itu. Ini bukannya bersamaan dengan pakatan sulit atau komplot. Bertentangan dengan tuduhan-tuduhan kosong itu, terdapat rekod yang tidak tercemar mengenai penyelesai sementara itu yang mana tauliah dan kerjanya telah dipamerkan sepenuhnya dan tidak ada sebarang kejanggalan atau penyalahgunaan kuasa atau proses yang telah ditunjukkan berkenaan mana-mana satu daripada 160 buah syarikat yang pernah digulungkan olehnya melalui perintah Mahkamah Tinggi Malaya (lihat ms 578I, 579A–B; *Chock Kek Ling v Patt Hup Transport Co Ltd & Ors* [1966] 1 MLJ 120 diikut).

(3) Di atas fakta dalam afidavit-afidavit itu, tiada sebarang kebenaran di dalam dakwaan pemohon. Dalam mengambil kira fakta kes ini, seperti yang diikrarkan oleh pemohon di dalam pelbagai afidavit, sikap, kepercayaan dan matlamat pempetisyen dan penyelesai sementara itu adalah hanya untuk melaksanakan proses sah undang-undang sahaja. Apa sekalipun, ketiadaan kausa yang mungkin atau yang munasabah tidak ditunjukkan oleh pemohon tersebut. Maka, pemohon gagal membuktikan suatu kes untuk pendakwaan niat jahat, kerana sepanjang pencerobohan dan/

atau perbuatan pendakwaan niat jahat seperti yang dinyatakan itu, penyelesai sementara itu telah menjalankan tugasnya atas nasihat dan panduan peguamcara, termasuk peguamcara pempetisyen itu (lihat ms 580F, H, 581C; *QIW Retailers Ltd v Felview Pty Ltd & Anor* (1989) 7 ACLC 510 diikut). A

(4) Di mana sesuatu proses undang-undang telah disalahgunakan untuk memuaskan motif yang lain seperti peras ugut atau penindasan, suatu tindakan akan dibenarkan kepada pihak yang telah dipersalahkan. Ini adalah tort penyalahgunaan proses yang bergantung kepada penyalahgunaan proses walaupun ia telah didapati secara sah. Penyalahgunaan proses digunakan terutamanya atas alasan tindakan itu di luar proses undang-undang atau tindakan yang mana mahkamah diminta memutuskannya. Di sini, pemohon tidak membuktikan kepada mahkamah bahawa fakta kes ini menyokong satu kes penyalahgunaan proses terhadap penyelesai sementara itu. Ini adalah kerana tidak terdapat sebarang penyalahgunaan jika seorang plaintif benar-benar cuba mencapai apa yang dibenarkan kepadanya melalui sesuatu guaman dan oleh itu memfailkan guaman itu bagi tujuan mencapai matlamat tersebut (lihat ms 583B–F, H; *Grainger v Hill* (1838) 4 Bing NC 212; 132 ER 769 dan *Goldsmith v Sperrings Ltd* [1977] 2 All ER 566 diikut). B C D

(5) Pemohon di sini adalah pihak ketiga yang dikacau oleh tindakan penyelesai sementara dan mereka tidak termasuk di dalam lingkungan s 229(1) Akta itu atau k 277(2) Kaedah-Kaedah itu (lihat ms 584E). E

(6) Untuk membawa sesuatu tindakan terhadap pegawai mahkamah, kebenaran mahkamah mesti diperolehi terlebih dahulu. Oleh kerana ini adalah kes di mana pemohon ingin memfailkan prosiding dalam tort terhadap penyelesai sementara yang dilantik oleh mahkamah, kebenaran mesti diperolehi. Ini disebabkan kesalahan yang diadukan oleh pemohon dibuat semasa penyelesai sementara memegang jawatan yang bermakna dia adalah seorang pegawai mahkamah (lihat ms 585I; *Zainal Abidin Putih & Anor v Che Wan Development Sdn Bhd* [1992] 2MLJ 233 dan *Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204 diikut). F G

(7) Jelas bahawa permohonan ini adalah berdasarkan ss 218 dan 143 Akta itu. Oleh kerana pemohon mengeluarkan saman dalam kamar di bawah nombor kes yang sama yang berkenaan dengan tindakan penggulungan syarikat dan secara khususnya menyebut dalam kepala (intitulement) bahawa mereka akan bergantung kepada peruntukkan dalam Akta itu yang mana pemohon merasakan relevan untuk kes mereka, mereka terikat dengan tindakan mereka sendiri. Amaran yang secukupnya telah diberikan kepada penyelesai sementara bahawa pemohon akan menghadkan diri mereka kepada Akta itu dan, oleh itu, mereka mesti mencari remedi mereka di dalam lingkungan Akta itu sahaja. Ini bermakna bahawa adalah salah untuk pemohon meminta kebenaran di bawah tindakan yang telah difailkan yang berkaitan dengan perkara-perkara syarikat. Permohonan ini adalah di bawah tort H I

di bawah common law dan pemohon sepatutnya memohon melalui saman pemula. Tambahan lagi, permohonan untuk kebenaran mengisukan writ untuk ganti rugi di bawah common law juga sepatutnya dibuat melalui saman pemula. Maka, permohonan ini mesti gagal (lihat ms 586E, 587D, I, 588A; *Cheow Chew Khoon @ Teoh Chew Khoon (t/a Cathay hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457 diikut).

(8) Kes prima facie yang kuat di atas fakta mesti dibuktikan sebelum kebenaran diberikan untuk mendakwa seseorang penyelesai. Walau bagaimanapun, di atas fakta dan undang-undang dalam kes ini, pemohon telah gagal membuktikan bahawa terdapat keterangan yang mencukupi untuk memberikan kebenaran memfailkan tindakan untuk tort komplot, penyalahgunaan proses undang-undang, pendakwaan niat jahat dan pencerobohan (lihat ms 588G, H; *Furber v Kratter* (The Times, 21 July 1988) tidak diikut).]

[*Editorial Note*: The applicants have appealed to the Court of Appeal vide Civil Appeal No W–02–67–96.]

**Notes**

For cases on liquidators in winding-up cases, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 483–496.

**Cases referred to**

*Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457
*Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204
*Chock Kek Ling v Patt Hup Transport Co Ltd & Ors* [1966] 1 MLJ 120
*Furber v Kratter* (The Times, 21 July 1988)
*Grainger v Hill* (1838) 4 Bing NC 212; 132 ER 769
*Goldsmith v Sperrings Ltd* [1977] 2 All ER 566
*James Smith & Sons (Norwood) Ltd v Goodman* [1936] 1 Ch 216
*Lim Hean Pin v Thean Seng Co Sdn Bhd & Ors* [1992] 2 MLJ 10
*Lonrho Plc v Fayed & Ors* [1991] 3 All ER 303
*Metall und Rohstoff AG v Donaldson Lufkin and Jenrette & Anor* [1988] 3 WLR 548
*Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281
*Omarjee v Lincoln Hunt Australia Pty Ltd* (1986) 4 ACLR 205
*QIW Retailers Ltd v Felview Pty Ltd & Anor* (1989) 7 ACLC 510
*Speed Seal Products Ltd v Paddington* [1986] 1 All ER 91
*Timberland Ltd (in liquidation) and Equitable Forestry Services Pty Ltd (in liquidation), Re* (1976) 2 ACLR 346
*Varaira v Howard Smith* (1911) 13 CLR 35
*Winch v Jones & Anor* [1985] 3 All ER 97
*Zainal Abidin Putih & Anor v Che Wan Development Sdn Bhd* [1992] 2 MLJ 233

**Legislation referred to**

Companies Act 1965 ss 143, 218, 229(1), 233, 244(1), 277(2)

Companies (Winding-Up) Rules 1972 rr 63, 65(1), (2), 66, 277(2) Form 33 A
Courts of Judicature Act 1964 s 14
Companies Act 1961 s 278 [Aust]

*MS Murthi (Murthi & Partners)* for the applicants.
*CK Tan (CK Tan & Co)* for the respondent. B

*Cur Adv Vult*

**Kamalanathan Ratnam JC**: This is an application for leave to commence proceedings against the provisional liquidator for the tort of conspiracy, abuse of legal process, malicious prosecution and trespass and for consequential damages. C

FACTS LEADING TO THE FILING OF THIS APPLICATION

TN Metal Industries Sdn Bhd is the registered owner of premises Lot 1, Lorong 10B, Telok Panglima Garang, Banting, Selangor ('Telok Panglima address'). Dreambed (Malaysia) Sdn Bhd and KKBI System (M) Sdn Bhd are two tenants of the said owner and have their place of business at the said Telok Panglima address. A fourth company called King Koil Inc Sdn Bhd has at the same premises its leased and hire purchase machinery. All four companies are the applicants herein. D E

Matsushita Greatwall Corp Pte Ltd ('the petitioners') filed a petition to wind up a company called KKBI Manufacturing Sdn Bhd (formerly known as King Koil Bedding Industries (M) Sdn Bhd ('the respondent company') under ss 218 and/or 143 of the Companies Act 1965 ('the Act'). F

In the meantime, prior to the winding-up order being made, the petitioners filed an ex parte application to appoint one Ng Pyak Yeow as the provisional liquidator ('the provisional liquidator') of KKBI Manufacturing Sdn Bhd, without security and obtained an order before Abdul Malek J on 6 April 1995 ('the ex parte order').

No sooner had he been appointed, the provisional liquidator promptly filed an ex parte summons in chambers praying for various orders amongst which were: G

(1) that the bailiff of Telok Datok Magistrates' Court, Banting, Kuala Langat do hereby, in execution of the order of court made on 6 April 1995, take possession and control of Lot 1, Lorong 10B, Telok Panglima Garang, Banting, 42500 Kuala Langat; and H

(2) that the bailiff immediately upon taking possession of the property deliver possession and control of the same to the provisional liquidator, Mr Ng Pyak Yeow.

In support of the above application, the provisional liquidator affirmed that on 7 April 1995 he proceeded to the place of business of the respondent company at No 64, Jalan SS22/25, Damansara Jaya, 47400 Petaling Jaya ('the Damansara address'), which said address he obtained from the annual returns of the respondent company made on 8 June 1993 and filed with the Registrar of Companies. He then proceeded to the said place of I

business on 7 April 1995 and was there informed by one Mr Mak that the respondent company's documents, books and other effects of business were to be found at the Telok Panglima address.

He then proceeded to the Telok Panglima address and met one Mr Cheong Tack Pook who identified himself as a director of the respondent company. He then showed the sealed copy of the order of court appointing him the provisional liquidator and requested Mr Cheong Tack Pook and his staff to vacate the premises and to hand him the keys to the property. This was flatly refused by Mr Cheong Tack Pook.

The provisional liquidator then went to the local police station and sought the assistance of one Sergeant Esa, the officer in charge of the said police station. Again Mr Cheong Tack Pook refused to vacate. On advice by Sergeant Esa, he lodged a police report of this and on further advice by the police, he tried to obtain a warrant of arrest at the Telok Datok Magistrates' Court on 8 April 1995 against Mr Cheong Tack Pook. As the learned magistrate refused to issue a warrant of arrest without the approval of this court he then made the abovesaid application and obtained the orders prayed for as stated earlier, before Abdul Malek J on 10 April 1995.

The respondent company then on 12 April 1995 filed a summons in chambers to set aside the ex parte order dated 10 April 1995 which was heard on 17 April 1995 with the provisional liquidator himself personally appearing before Abdul Malek J and consenting that the order dated 10 April 1995 be set aside.

The order dated 10 April 1995 having been set aside, the four applicants now seek leave to commence proceedings in tort against the provisional liquidator.

FACTS AVERRED BY THE APPLICANTS IN SUPPORT OF THEIR APPLICATION

One Tay Yew Keng affirmed an affidavit on behalf of all the applicants ('Tay's affidavit') wherein he contended that arising out of the wrongful conduct of the provisional liquidator the applicants had suffered losses as set out in the draft statement of claim, exhibited thereto.

THE DRAFT STATEMENT OF CLAIM

In the said draft statement of claim, the four applicants who are the proposed plaintiffs intend to sue the three proposed defendants, namely Liong Thiam Keong ('the proposed first defendant'), the petitioners ('the proposed second defendant') and the provisional liquidator ('the proposed third defendant'). I gathered from a study of all related affidavits that the proposed first defendant who had affirmed the affidavit in support of the application to appoint the provisional liquidator is the managing director of the petitioners.

It was alleged in the proposed statement of claim that the proposed second defendant at the instigation of the proposed first defendant applied ex parte to appoint the proposed third defendant as provisional liquidator. It was further alleged in para 13 that 'the defendants unlawfully unconspired to injure the plaintiff by abuse of the legal process, malicious enforcement of order (dated 6 April 1995) and trespass' and gave various particulars. I take note that the word 'unconspired' ought to mean 'conspired'. There

was a further allegation that the proposed defendants wanted to paralyse the operation of the proposed plaintiffs' business. There were allegations of collusion, bad faith and malicious intent with ulterior motive to damage the proposed plaintiffs' business. There was also a claim for special damages suffered by each of the four proposed plaintiffs.

In reply to Tay's affidavit, the provisional liquidator affirmed an affidavit in which he stated that he had been a public accountant of 19 years' standing and had 29 years of varied and diverse knowledge and expertise in accountancy, taxation, management and other related fields. He had been a liquidator for many voluntary winding-up proceedings as well as the court appointed liquidator on compulsory winding-up proceedings. He had many professional qualifications and had published many papers and conducted many seminars and workshop sessions and within the last eight years had been appointed liquidator to at least 160 companies which had been ordered to be wound up by the High Court of Malaya. His appointment on 6 April 1995 required him to take possession, control and protect the assets of the respondent company as well as to employ and/or terminate the employment of the respondent company's employees. He also averred that the petitioners had given an undertaking to abide by any order made by this court in respect of damages held to be sustained by the respondent company by reason of his appointment as the provisional liquidator. Based on the searches made in respect of the applicants, he averred that the applicants and the respondent company are all related companies and share some of the same directors and shareholders.

He questioned the propriety of the affidavit of Tay Yew Keng who is the managing director of the first applicant affirming the affidavit in support of this application on behalf of all the other three 'individual legal entities' and averred that the first applicant which was a 100% owned subsidiary of the fourth applicant was not even in operation at the material time. He then set out chronologically the day by day events during his tenure of office as a provisional liquidator from date of appointment to the date he consented to the order dated 10 April 1995 to set aside his appointment.

It must be noted that his appointment was as a provisional liquidator and since by consent the company was wound up on 12 April 1995 and as the official receiver was appointed provisional liquidator, his tenure of office clearly became redundant.

It is noteworthy that the provisional liquidator had specifically pleaded that after proceeding to the office of the respondent company at the Damansara address and on being told by one Mr Mak of the Telok Panglima address, one of the solicitors of the petitioners who accompanied him, called the petitioners in Singapore, who confirmed and gave him the exact address which was the Telok Panglima address. He also affirmed that there was a company sign of the respondent company on the wall of the premises. He would terminate the services of the employees temporarily if necessary to prevent sabotage or dissipation of assets or removal of documents.

He further averred that on 10 April 1995 having obtained the ex parte order to take possession of the respondent company's factory he

A proceeded to the Telok Panglima address where he was met by the same Mr Mak and one Mr Yeoh Chin Wah together with Major Murthi, the applicants' counsel herein, and upon the said counsel giving his solicitor's undertaking that the assets of the company would not be concealed or removed pending the hearing of the application to set aside the order appointing him provisional liquidator he agreed not to take possession. In fact, he specifically averred that on both dates he had never proceeded beyond the reception area of the property.

One other matter averred by the provisional liquidator was in relation to a draft letter of termination of employees. He had telephoned his office to fax a draft letter of termination to the respondent company at the Telok Panglima address for his use. Whilst his office fax record showed that the draft letter had indeed been faxed to him at the respondent company's office, the respondent company's staff denied that the said letter had gone through their fax machine.

He further contended that if the applicants had any bona fide complaints against him they should first take their complaint to the Official Receiver as is provided for under s 229(1) of the Act.

He also relied on r 63 of the Companies (Winding-Up) Rules 1972 ('the Rules') conferring him the status of an officer of the court and by reference to s 14 of the Courts of Judicature Act 1964 ('the CJA') he further claimed judicial protection in the lawful discharge of his duties.

Subsequently, the proposed first defendant (the managing director of the petitioners) filed another affidavit in which he affirmed that the respondent company operated a factory at the Telok Panglima address and his knowledge of this was based on information provided to him by various suppliers who supplied new materials to the respondent company for the latter's manufacturing process. He knew these suppliers because even the petitioners purchased from the same suppliers.

In response to the above, the finance manager of the first applicant affirmed an affidavit in reply in which he stated that the undertaking as to damages provided by the petitioners applied to the respondent company and not to third parties such as the present four applicants. Whilst admitting that there were common directors of the companies involved, he denied that the said companies were interrelated. Mr Mak denied informing the provisional liquidator that the books of accounts were at the Telok Panglima address. According to Mr Mak, the provisional liquidator merely asked him the whereabouts of KKBI and he took this to mean the third applicant herein. Cheong Tack Pook vide his affidavit said that the provisional liquidator wanted to sack the employees and thus handed him a letter addressed to the Telok Panglima address but did not identify the company to which the purported termination applied.

Fong Heng Leong denied that there was any sign of the respondent company on the wall of the Telok Panglima address.

CASE FOR THE APPLICANTS

Mr Murthi for the applicants summed up the case for the provisional liquidator based on their affidavits into three heads:

(1) Challenge to the facts.

(2) Section 14 of the CJA is pleaded to claim immunity.

(3) Section 229 of the Act has been pleaded as a defence.

*Challenge as to facts*

The court was taken through the facts. I have related in extenso the relevant facts material to this application. The provisional liquidator has averred that the applicants and the respondent company are all related companies and share some of the same directors and shareholders. I have to consider this in the light of the affidavit sworn by Tay Yew Keng, the managing director of the first applicant and who has been duly authorized to affirm the affidavit on behalf of the rest of the applicants. When this issue was raised by the provisional liquidator, the applicants countered with a terse response that since the other three applicants did not mind, what business did the provisional liquidator have to speak for the three companies. I am of the view that the very fact that the three other independent legal entities have entrusted their case into the hands of the managing director of the first applicant lends weight to the provisional liquidator's suggestion that the applicants and the respondent company share the same directors and shareholders. In fact in para 18 of encl 42, the provisional liquidator specifically alleged that relationships between the applicants and the respondent company are so closely intertwined and interrelated. In his reply, Fong Heng Leong at para 15 of encl 45 merely denied 'that the respondent companies (should be applicant companies) are closely intertwined and interrelated'. There was no specific denial of the interrelationship between the applicants and the respondent company as alleged by the provisional liquidator herein.

I remind myself of the averment of the law in this respect as expressed by Gopal Sri Ram JCA in *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 (CA) and with which I totally associate myself. His Lordship said at p 286:

> Now, it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted.

I now consider the allegations of collusion, bad faith, conspiracy and malicious intent levelled against the provisional liquidator. It was contended that if Mr Mak had told the provisional liquidator of the Telok Panglima address surely the provisional liquidator would have mentioned this fact in his police report. In *Chock Kek Ling v Patt Hup Transport Co Ltd & Ors* [1966] 1 MLJ 120 at p 121 Azlan Shah J (as His Highness then was) said:

> The report does not and will not contain everything under the sun. It is merely the first step to bring the police machinery into effect.

There is no requirement that the maker of a report has to state every allegation in his police report. Once a report stating basic facts necessary to commence an investigation is made then a statement is recorded and details are given in that statement. Further, surely in making such a

suggestion, the applicants failed to appreciate that one is always wiser after the event. It was also suggested that the provisional liquidator took directions from the petitioners. Of course he had to, and he had to be accompanied and rightly so by the solicitors for the petitioners. This cannot amount to collusion or conspiracy. As opposed to such bare allegations, is the untarnished record of the provisional liquidator whose credentials and work had been laid bare and no impropriety or abuse of power or process has been shown in respect of any of the 160 companies he had so far wound up by order of the High Court of Malaya.

The provisional liquidator has affirmed that when he went to the Damansara address of the respondent company he was directed by Mr Mak to the Telok Panglima address. In addition to that, one of the solicitors of the petitioners who accompanied him, called the petitioners in Singapore who confirmed the Telok Panglima address as the correct address of the respondent company. No doubt Mr Mak had denied this but can conspiracy be founded on these facts?

One other fact that stands out and speaks volumes in respect of the applicants' conduct is the draft letter of termination. The provisional liquidator affirmed that he had telephoned his office to fax a draft letter of termination of the employees to the Telok Panglima address. The employees denied receiving the fax contending it did not come through their machine. However, in encl 26 Tay Yew Keng had specifically annexed this draft letter and in para 31 he affirms thus:

> Annexed hereto is a copy of the letter marked 'A 17' issued by the provisional liquidator to the person at the office of premises. The provisional liquidator purported to terminate the service of all the employees of the applicant Company, KKBI Sistem Sdn Bhd and Dreambed Sdn Bhd who occupy the premises.
>
> A 17 is reproduced herewith:
>
> Ng, Lee & Partners
> Public accountants
>
> Our ref: KKBI/M–01/ML
>
> 7 April 1995
> To all the people present
> Lot 1, Lorong 10B
> Telok Panglima Garang
> Banting
> 42500 Kuala Langat
>
> Dear Sirs
>
> High Court of Malaya at Kuala Lumpur Companies (Winding-Up) No D5–28–400 of 1993 KKBI Manufacturing Sdn Bhd in liquidation (formerly known as King Koil Bedding Industries (M) Sdn Bhd)
>
> ---
>
> I am appointed the provisional liquidator for the abovementioned company on 6 April 1995 before the Honourable Abdul Malek J, High Court of Malaya at Kuala Lumpur. I enclose a copy of the sealed order for your information. In accordance with r 63 of the Companies (Winding-Up) Rules 1972, I am also an officer of the High Court and it is in this capacity that I am writing to you.

In accordance with prayer 1 (c), I now write to inform you that I am temporarily terminating all the employees of the company with immediate effect. This is to enable me to ascertain the financial position of the company. I shall contact you again when I have done so. A

Yours truly,

—Sgd— B
For and on behalf of KKBI Manufacturing
Sdn Bhd in liquidation
Ng Pyak Yeow
Provisional liquidator

It will be noted that the said letter is unsigned. I cannot by any stretch of C
the imagination subscribe to the suggestion that a provisional liquidator of such experience would have not signed the termination notice since it is alleged that it was issued to the person at the office. The clear inference is that is must have come off the fax and is now being used by the applicants for their own purpose. Further, whilst the letter is addressed to all the D
people present at the Telok Panglima address it is specifically addressed to KKBI Manufacturing Sdn Bhd in liquidation (formerly known as King Koil Bedding Industries (M) Sdn Bhd).

Another interesting fact to note is that the provisional liquidator averred that he directed his office to fax the said letter to the respondent company's address which was at the Telok Panglima address. Since the E
letter arrived at that place it must, therefore, be that the respondent company's address must have been also at the Telok Panglima address and this has not been denied in any affidavit.

On the facts as they stand on the affidavits, I cannot find any substance in the applicants' allegations. F

In *QIW Retailers Ltd v Felview Pty Ltd & Anor* (1989) 7 ACLC 510 at p 519, Macrossan J said this with regard to the torts of malicious prosecution and abuse of process in considering a case involving the winding-up of a company:

The mental ingredients involved in the commission of both torts are to be G
assessed by considering the attitudes, beliefs and objectives of the second defendant.

Taking into consideration the facts of the present case, as averred by the applicants in the various affidavits, the attitudes, beliefs and objectives of the petitioners and the provisional liquidator were nothing more than to H
execute the due process of the law.

Macrossan J further continued also at p 519:

In malicious prosecution, a plaintiff has to prove that proceedings have been maliciously instituted, or continued against him and that they have terminated in his favour. He is obliged to show, as well, that the proceedings were so I
broad or continued without reasonable and probable cause and that some special injury or damage has been sustained by him in consequence.

In the tort of malicious prosecution, want of reasonable and probable cause is an additional ingredient for which proof is required in addition to malice: *Glinski v McIver* [1962] AC 726 at p 744.

Macrossan J describes the concept of reasonable and probable cause as follows at p 520:

> The concept involves a belief based upon reasonable grounds of the existence of a state of circumstances which, if true, would reasonably lead an ordinary prudent man, placed in that situation, to the conclusion that the proceedings would probably succeed. The belief referred to may not always need to be inquired into but the facts as they were known to the one who instituted the relevant proceedings do need to be established and scrutinized: per Denning LJ in *Tempest v Snowden* [1952] 1 KB 130 at pp 138–139.

In any event, it is my finding that on the facts herein, absence of reasonable and probable cause has not been shown by the applicants. On this basis alone, I hold that the applicants have failed to show a case for malicious prosecution. I arrive at this conclusion because throughout the alleged trespass and/or act of malicious prosecution the provisional liquidator had proceeded on the guidance and advice of solicitors including the petitioners' solicitors from Singapore.

*Section 14 of the CJA*

The provisional liquidator relied on s 14 of the CJA.

Section 14 reads as follows:

> 14 Protection of judges and other judicial officers.
>
> (1) No judge or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of.
>
> (2) No officer of any court or other person bound to execute the lawful warrants or orders of any judge or other person acting judicially shall be liable to be sued in any civil court for the execution of any warrant or order which he would be bound to execute if within the jurisdiction of the person issuing the same.
>
> (3) No sheriff, bailiff or other officer of the court charged with the duty of executing any judgment, order or warrant of distress, or of attaching any property before judgment, shall be liable to be sued in any civil court in respect of any property seized by him, or in respect of damage caused to any property in effecting, or attempting to effect the seizure, unless it shall appear that he knowingly acted in excess of the authority conferred upon him by the writ, warrant or order in question, and he shall not be deemed to have acted knowingly in excess of his authority merely by reason of knowing of the existence of a dispute as to the ownership of the property so seized.

Mr Murthi argues that based on s 14(1) even a judicial officer performing a judicial act will be liable if there is want of good faith in believing he had jurisdiction to do or in doing the act complained of. Section 14(2) relates to the execution of the orders made by a court; in other words in the execution of ministerial duties. However, in so far as this present application is concerned, Mr Murthi concedes that the relevant provision would be s 14(3). It is the applicants' contention that the protection afforded by this

subsection is limited to the actual enforcement, provided it is not in excess of the authority conferred upon him. They also contend that this subsection does not afford protection relating to antecedent acts, ie if there is conspiracy and/or abuse of legal process occurring before the order is enforced. It is further contended that this subsection affords no protection to acts done outside the scope of the order, eg where a third party's right is affected and in which case it is argued that the ability of the sheriff, bailiff or other officer of the court arises independently.

Officers of the courts act either judicially or ministerially. A judicial act is one wherein upon the occurrence of a dispute the matter is heard and adjudicated upon with or without the exercise of discretion. A ministerial act is one which is required by law to be performed and the doer has no discretion in the matter but to do it.

In the present case, the applicants contend that there is an abuse of court process and seek refuge upon the English Court of Appeal decision in *Speed Seal Products Ltd v Paddington* [1986] 1 All ER 91 which held that the tort of abuse of the process of the court would lie against a plaintiff when it could be shown that he had set proceedings on foot to effect an object or purpose which was not within the scope of the process.

In fact, the case that founded this tort of abuse of the process of the court was *Grainger v Hill* (1838) 4 Bing NC 212; 132 ER 769. In that case, the plaintiff had borrowed £80 from the defendants on the mortgage of a ship which he owned. The debt was repayable on 28 September 1837. The defendants, being apparently apprehensive as to their security, decided in November 1836 (ie before the debt was repayable) to possess themselves of the ship's register, without which the plaintiff could not go to sea. They, therefore, called on the plaintiff to pay the debt (which was not due) and threatened to arrest him if he failed to pay. The defendants then made an affidavit of debt and sued out a writ of capias indorsed for bail in the sum of some £95, and sent in two sheriff's officers with the writ to the plaintiff, who was ill in bed and attended by a surgeon. One of the officers then told the plaintiff that they had not come to take him but to get the ship's register, but that if he failed to deliver the register either they must take him or leave one of the officers with him. The plaintiff, being unable to procure bail and being alarmed, gave up the register. The plaintiff claimed damages for the loss of voyages which he could not undertake because of the loss of the register, and also the recovery of the register.

The plaintiff succeeded at the trial, and there was an appeal to the Exchequer Chamber, which dismissed it. Tindal CJ said (1838) 4 Bing NC 212 at p 221, 132 ER 769 at p 773):

> The second ground urged for a nonsuit is, that there was no proof of the suit commenced by the defendants having been terminated. But the answer to this, and to the objection urged in arrest of judgment, namely, the omission to alleged want of reasonable and probable cause for the defendants' proceedings, is the same: that this is an action for abusing the process of the law, by applying it to extort property from the plaintiff, and not an action for malicious arrest or malicious prosecution, in order to support which action the termination of the previous proceeding must be proved ...

In *Goldsmith v Sperrings Ltd* [1977] 2 All ER 566 at p 574, Lord Denning MR in a dissenting judgment said:

> What may make it (the legal process) wrongful is the purpose for which it is used. If it is done in order to exert pressure so as to achieve an end which is improper in itself then it is a wrong known to the law.

Where a legal process, the basis for which in itself could have proper foundation, has been perverted to satisfy some other motive such as extortion or oppression, an action will lie at the feet of a party that suffers the wrong. This is the tort of abuse of process. Unlike the tort of malicious prosecution, the tort of abuse of process does not depend on the wrongful procurement of the legal process but in the misuse of the process however correctly it was obtained. It is, as succinctly described by Isaacs J in *Varaira v Howard Smith* (1911) 13 CLR 35 at p 91:

> A stalking horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the court is asked to adjudicate.

It is to be observed from *Grainger*'s case that gave origin to this tort that there must be an act, or a threat that accompanied the legal process and which act or threat was committed for the purpose of furthering the misuse. Every advantage that a litigant intends to take against his opponent after launching an action cannot be labelled as an abuse of process merely because the court has no authority or power or jurisdiction to grant the order sought. It takes on the mantle or sinisterness when the ulterior motive is to take a distinctive advantage over one's opponent upon a matter unrelated to the legal process commenced.

In order to come within the *Grainger* principle, the abuse of process must be used mainly for a purpose outside the scope of the legal process or an action which the court is asked to adjudicate upon. Thus, in *Metall and Rohstoff AG v Donaldson Lufkin and Jenrette Inc & Anor* [1988] 3 WLR 548, damages for the tort of abuse of process of the court was refused where a defendant sought dishonestly to defend an action and gave dishonest evidence in order to defeat a just claim.

Coming to the case at hand, it is the contention of the applicants as pleaded in their draft statement of claim that the provisional liquidator wanted to paralyse the four applicants' business and to apply pressure on the directors of the said company to settle the unjust demands of the petitioners.

To my mind whilst I hold that the tort of abuse of process is available to any one so aggrieved the applicants have not satisfied me that on the evidence disclosed in the affidavits and narrated by me in extenso, that the facts narrated bear out a case for abuse of process against the provisional liquidator. Therefore, there would be no abuse involved if a plaintiff genuinely seeks to achieve what he is entitled to by way of a suit and thus files the suit for the purpose of achieving that objective.

Mr Murthi referred me to r 65(1), (2) and r 66 of the said Rules. He in particular referred to Form 33 and argued that the provisional liquidator ought to have served this Form 33 notice on the parties and ought not to have acted in the manner he did. The pitch and substance of this argument

falls deflated when we refer to s 244(1) of the Act which requires a list of contributories to be settled as soon as may be after making a winding-up order by the court. Here, the provisional liquidator was appointed prior to the making of a winding-up order.

*Section 229 of the Act*

It was the contention of the provisional liquidator that instead of bringing this action against him, the applicants ought to have proceeded under s 229(1) of the Act and r 277(2) of the Rules. However the applicants pointed out that pursuant to r 277(2), the parties who can complain against the liquidator are the creditor, contributory or the Official Receiver and since they belong to none of these three groups they fall outside the ambit of r 277(2).

The provisional liquidator relied on *Re Timberland Ltd (in liquidation) and Equitable Forestry Services Pty Ltd (in liquidation)* (1976) 2 ACLR 346 and argued that the applicants ought to seek their remedy under the Act. By s 278 of the Australian Companies Act 1961, the three parties who can complain to the court are the creditor, the contributory and the court itself. Therefore, even a third party like the applicants herein can seek to complain to the court for it to take cognisance of the matter. Whereas, our r 277(1) has substituted the court with the Official Receiver.

I agree with Mr Murthi that since the applicants herein are third parties affected by the conduct of the provisional liquidator they do not fall within the ambit of s 229(1) of the Act or r 277(2) of the Rules.

The applicants relied on *James Smith & Sons (Norwood) Ltd v Goodman* [1936] 1 Ch 216 at p 222 and argued that they do have a cause of action against the provisional liquidator.

In *James Smith & Sons*, the lessors of certain premises brought an action against the liquidator for a declaration that, in distributing the assets without making provision for the liabilities of the company under the two leases, the liquidator had acted wrongfully, negligently and in breach of his duty as a liquidator, and sought damages.

It was thus argued before me that similarly the applicants herein have a cause of action against the provisional liquidator.

The applicants also referred me to *Lonrho Plc v Fayed & Ors* [1991] 3 All ER 303 to support their argument that even using a lawful process a party can be guilty of the tort of conspiracy if the predominant motive was to cause injury.

The applicants contend that 'unfair means' have been resorted to by the provisional liquidator to enforce the execution in this case. 17 *Halsbury's Laws of England* (4th Ed) at para 457 gives an example of unfair means such as the procuring of a search warrant to enable the bailiff to enter into the premises of the execution debtor.

It was the contention of the applicants that the provisional liquidator took instructions from the petitioners and to a question by the court Mr Murthi conceded that he had no direct evidence to hold that submission. However, it was submitted that the provisional liquidator suppressed evidence from the court when he obtained the ex parte order on 10 April 1995 in that it was said that the provisional liquidator did not affirm in the

A said affidavit that he was told by the applicants' representative that he had come to the wrong premises.

To my mind, the omission to state this did not amount to suppressing evidence. The provisional liquidator had sufficient material before him to justify his proceeding to the Telok Panglima address. In respect of this issue B raised I can do no better than refer to *Lim Hean Pin v Thean Seng Co Sdn Bhd & Ors* [1992] 2 MLJ 10 at p 28 wherein Edgar Joseph Jr J (as His Lordship then was) had this to say on the issue of non-disclosure of material fact:

> In these circumstances, I accept that the non-disclosure was related to a material fact but I do not consider that it was so *severe* that had it been disclosed I would have declined to intervene by way of ex parte interlocutory injunctive relief.

C

Finally, the applicants submitted that since there were two sets of facts, namely one by the applicants contending wrongful attachment of their premises and supported by relevant exhibits and another by the respondent alleging that the Telok Panglima address was that of the respondent company, then in such circumstances it is not the duty of the court to D adjudicate on the conflicting evidence but to see if the claim deserved a fuller investigation and reference was made to *Winch v Jones & Anor* [1985] 3 All ER 97 at pp 99, 101, 102 in support of the above proposition.

THE NEED FOR LEAVE FROM THIS COURT BEFORE ISSUANCE OF WRIT

E The then Supreme Court held in *Zainal Abidin Putih & Anor v Che Wan Development Sdn Bhd* [1992] 2 MLJ 233 at p 241 that as the appellants were appointed receivers by the High Court and as they were officers of the court, leave of the court should have been obtained to proceed against them.

Since this is also a case where the applicants intend to file proceedings F in tort against the court appointed provisional liquidator, for damages, leave is therefore being sought.

In *Furber v Kratter* (The Times, 21 July 1988), it was held that a difficult point of law ought not to be determined as a preliminary point on an application for leave. If the point is arguable, leave should be given so G that the plaintiff can put his case at trial.

The provisional liquidator contended that if the applicants were of the view they had a case against him they ought to file directly against him and that there was no need for leave. Mr Tan sought to distinguish *Zainal Abidin Putih* by arguing that in *Zainal Abidin Putih* the receiver was continuously still holding office whereas in the present case the provisional H liquidator held office only for seven days and when the company was wound up by consent, the Official Receiver took over. Mr Tan argued that since the provisional liquidator had already vacated his office there was, therefore, no need for leave.

This is a fallacious argument. The mischief complained of by the I applicants was done whilst the provisional liquidator was in office. Since it has been established that in such circumstances he was then for all purposes, an officer of the court, I therefore hold that the principle laid down in the *Zainal Abidin Putih* case must apply and leave must be obtained.

I am further bound to follow the recent decision of the Court of Appeal in *Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204, wherein Abu Mansor JCA held that since a liquidator is appointed by the

court and is therefore considered an officer of the court, leave of court is necessary before an action can be commenced against him. A

The provisional liquidator argues that since this application is made under the Act whatever action or remedy that the applicants seek must come within the ambit of the Act.

INTITULEMENT B

I refer to the intitulement of this action as set out at the commencement of this judgment as filed by the applicants.

It can be seen, therefore, that the application is based on ss 218 and 143 of the Act. Section 218 relates to the winding-up of a company and s 143 deals with annual general meetings. In this case, the provisional liquidator was appointed under s 231 of the Act (before the winding-up order was made) for the specific purpose of ensuring that there would be no dissipation of the assets. See *Omarjee v Lincoln Hunt Australia Pty Ltd* (1986) 4 ACLR 205. Section 233(1) of the Act provides that the provisional liquidator shall take into his custody or under his control all the properties and things in action to which the company is or appears to be entitled. C D

I am therefore satisfied that there was no lack of authority in the appointment of the provisional liquidator and that he had the powers to act pursuant to s 233(1) of the Act.

I am of the view that the applicants having taken out a summons in chambers under the same case number dealing with the companies (winding-up) action and specifically raising in the intitulement that they would rely on the provisions of the sections of the Act which the applicants felt were relevant for their purpose, are bound by their own course of action. Fair warning has been given to the provisional liquidator that the applicants will confine themselves to the Act and, therefore, they must find their remedies within the strict walls of the Act. E F

Notwithstanding, the applicants' submission that their claim is not under the Act but under the common law and notwithstanding the fact that the proposed statement of claim shows an intended action in tort, yet leave is being sought under the Act. G

The only local case on the issue of intitulement is *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457 at p 477 wherein His Lordship Gopal Sri Ram JCA had this to say:

> The plaintiff, as noted earlier, says that if one were to undertake a careful scrutiny of the originating summons and the affidavit in support, one would come to the conclusion that it is not an application made under O 89. The summons does not, as I observed very early in this judgment, state any particular rule of court in its intitulement. Now, I think that that is not only wrong but plainly embarrassing. How, might one ask, is a defendant or the court to determine which rule of court the plaintiff is invoking unless he explicitly specifies it? If a defendant and the court should have to conduct a close examination of the supporting affidavit in each case in order to determine the particular jurisdiction or power that is being invoked by an originating summons or other originating process that requires an intitulement, then a plaintiff will be at liberty to shift from one rule to another or indeed from one statute to another as it pleases him without any warning whatsoever to his opponent or the court. It would make a mockery of the principle that there H I

must be no surprise in civil litigation. If the submission of counsel be the law, then it is wrong. But I am firmly of the view that it is not.

In my judgment, this matter, which is a point of practice and procedure, is to be resolved by reference to the fundamental principal that a party must not take his opponent or the court by surprise. It is my opinion, that an originating process requiring an intitulement must state, with sufficient particularity, either in its heading or in its body, the statute or rule of court under which the court is being moved: otherwise it would be an embarrassing pleading and may be liable to be struck out, unless sooner amended.

It is an elementary rule of civil litigation that a party ought not to take his opponent by surprise. Having elected to proceed to obtain leave pursuant to the Act, the applicants submit before me that their statement of claim clearly shows that they are relying on common law to found a claim in tort.

This is what Gopal Sri Ram JCA meant when he said that neither the court nor the defendant ought to be put in a position to go through and closely examine the affidavits or pleadings, to ascertain the particular jurisdiction or power that is being invoked.

I hold that the applicants ought to have applied by way of originating summons and since the claim is founded in tort, the intitulement ought to have been as follows:

In the matter of O 5 r 2(a) of the Rules of the High Court 1980

and

In the matter of ss 231, 233 and 236(3) of the Companies Act 1965.

By adopting the above course of conduct, the applicants would be indicating that they would be relying on the specific rule of the High Court as directed by Gopal Sri Ram JCA and O 5 r 2(a) of the Rules of the High Court 1980 clearly provides for the mode of commencement of an action in tort.

Reference to ss 231 and 233 of the Act will indicate that the applicants intend to launch an attack as against the provisional liquidator and as against the exercise of his powers

Mr Murthi cited the case of *Chi Liung & Son Sdn Bhd v Chong Fah & Sons Sdn Bhd & Anor* [1974] 2 MLJ 211 to suggest that he could file a summons in chambers under the same intitulement as for the winding-up.

In the *Chi Liung* case, Ajaib Singh J held that where there is an action pending before the court an application to extend an existing caveat may quite properly be made by way of summons in chambers in the pending action where the lands in question are the very subject matter of the pending action and where the claims in the action include claims of such a nature as would involve a consideration of the preservation or security of the lands until the rights of the parties concerned are finally determined by the court. The facts of the case are distinctly of such a nature as to require the filing of the summons under the same intitulement. The entire basis for the subsequent application is dependent on the pending initial action. There is no way that the two actions are independent of one another.

In the present case, I hold that it is wrong for the applicants to seek leave under the suit already filed which relates to company matters. The application for leave in respect of issuing a writ under common law for

damages ought to have been by way of originating summons. On this ground too, this application must fail. A

It is pertinent to note that the provisional liquidator had averred that he had not proceeded beyond the reception area. To a question by the court, Mr Murthi confirmed that his client had not denied that part of the affidavit. However, it was his contention that a mere act of trespass was sufficient for the applicants to apply for leave to sue. B

I hold that the conduct of the provisional liquidator in the exercise of his duties was, on the evidence so far tendered, irreproachable. I am well aware and indeed I have considered the fact that I ought not to determine as to whether the applicants have a case. However, I am duty bound to evaluate the evidence presented by the applicants to see if such evidence is supportive of this application. In my considered judgment, it is not. C

Section 232(2) of the Act provides for the remuneration or salary of a liquidator by way of percentage or otherwise and if there is no agreement regarding his fees, he has to apply to court to determine the mode of his remuneration. D

His task is an onerous one. He is charged with a number of statutory duties and he has a right to apply to court for directions and guidance. He is an officer of the court. He is open to accusations of impropriety, unfairness, and any label that a disgruntled party might seek to level at him. He ought to be protected against such abuse unless there is sufficient prima facie evidence to support such allegations. If any dissatisfied litigant is allowed to merely raise some issue and insist that on such mere allegations he be given leave to bring an action against a liquidator, then the wheels of justice, which at the moment grind extremely slowly, will in such circumstances come to a halt. No one will venture towards this task. A liquidator will spend all his time defending every action filed against him. He will then have to have professional indemnity insurance cover to protect himself against multifarious actions. Costs will escalate and his fees will have to be fixed. E F

I decline to adopt the principle enunciated in *Furber v Kratter*. I do not subscribe to the view that merely because a point is arguable leave should be given. I hold that a strong prima facie case on the facts must be established before leave will be given to sue a liquidator. G

Having reviewed the facts relating to this case and the law relating to this application, I find that the applicants have failed to satisfy me that there is sufficient evidence to warrant granting of leave to file an action for the tort of conspiracy, abuse of legal process, malicious prosecution and trespass. In any event even on the issue of intitulement the applicants have failed. I, therefore, dismiss this application with costs. H

*Application dismissed.*

I

Reported by CK Ong